United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals, District of Columbia

January Term, 1909

612

ANDREW O. NASH, ET AL.,

v.

CARRIE L. MILFORD, ET AL.

No. 1969.

Brief for Appellants.

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WILKENS, 11th and E Sts.

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v.

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STATEMENT OF FACTS

This is an appeal from the decision of the Court below adjudging the Appellees entitled to the specific performance of the contract to reconvey to them part of Lot 3 in Block 9 of the Barry Farm; and for failure of the Court below to allow Appellants full compensation for improvements made by them.

This case discloses a dispute about a title between the heirs of the original parties, all of whom died before the suit, by virtue of a bill filed January 12, 1898, to set aside a sale which occurred May 22, 1890, and to divest the Appellants of their title thereby acquired. There is no excuse given for the delay in bringing the suit either in the pleadings or the evidence.

The bill is based on the doctrine of specific performance.

There is no allegation of fraud either actual or constructive against Ephraim Nash, and as to his heirs (the Appellants) this stipulation is in the record, viz:

> "It is stipulated by and between counsel that the Defendant, Jane Nash, Louisa Nash and Charlotte Saunders, *Defendants,* had no actual notice or knowledge of the claims of John A. and Ellen S. Loudon, or the

> Complainants in this cause, to this property, prior to the institution of this suit" (R., 120).

The other Appellants testified to the effect that they had no such notice or knowledge (Andrew O. Nash, R., 119; Franklin P. Nash, R., 116; Wilbur F. Nash, R., 34; George Nash, R., 42), and they were not contradicted.

The Complainants in the bill do not offer to pay anything; they simply expect the property to pay for itself.

The case is best stated chronologically. The property was owned by Ellen F. Loudon and her husband, John A. Loudon (though what estates they had therein is not shown), who acquired it from Wm. H. Chew, for a recited consideration of $2,250.00, and at the time of the deed to the Loudons, the property was subject to a trust for $1,000 (R., p. 144). John A. Loudon was an unthrifty negro barber of irregular habits (R., 55, 104).

At the time of the purchase, the Loudons executed another trust on the property to Williamson and Sprague, Trustees, for $750 under date of February 8, 1889, to secure a series of $20 notes (R., p. 150).

All of these notes were found among the papers of Ephriam Nash after his death (R., 70-71).

On the 18th of June, 1889, the Loudons, then having only an equity of about $500 in the property, if it was worth $2,250.00, deeded it to Ephriam Nash in fee simple for a consideration of $800 (R., p. 4), and on the same date Nash entered into an agreement with the Loudons to reconvey the property whenever the income from the same should be sufficient to pay the second trust, the interest of the first trust, taxes, insurance, reasonable repairs and all other proper and lawful expenses in and about the management of said property.

Ellen F. Loudon died October 1, 1890 (R., p. 20), John A. Loudon died November 20, 1895 (R., 20), and Ephriam Nash died February 26, 1894 (R., p. 66).

Sometime after the deed to Nash and the agreement to reconvey, he became the holder of the $1,000 note, subsequent to November 25, 1891 (R., 74), and also prior to May 6, 1890, he

became the holder of the notes under the second trust (R., 153). Since the death of Ephriam Nash, his widow, Jane Nash, and his children, the other Appellants, have been in continuous possession, collecting the rents, making improvements, paying taxes, etc. (R., 65, 66, 67, 75, 76, 77, 78).

Ephriam Nash was a white man, who had a kindly feeling for negroes, and assisted them in many ways (R., 53 and 54). At the time of his contract with the Loudons, the latter were in possession of the property, known as Douglass Hall, various parts of which were rented to other people and from all of which they collected rents, which they refused to turn over to Nash, and they further refused to pay him anything on the rental of the whole or the notes (R., 60, 52, 126, 132), and the first of the interest notes under the first trust was overdue and unpaid (R., 148-9), and was paid by Nash presumably because it was found among his effects after his death (R., 70). The object of the agreement was thereby defeated immediately after its execution by the Loudons.

Nathan Sprague was at this time agent for Nash, and attempted to collect rents from the Loudons (52, 55, 172). Nash brought a Landlord and Tenant action in August, 1889, obtained a writ of restitution, and the Loudons were ejected. They immediately moved back into the building (R., pp. 53, 99, 124, 126, 131, 139, 140). The attempt to eject them from the building was met with very forcible resistance (R., 54, 108). Nash brought a second suit, in which he also obtained judgment, which the Loudons appealed to the Supreme Court of the District, where the judgment of the Justice of the Peace was eventually affirmed, and a writ of restitution was finally executed and Nash put into possession of the premises on the 2d of December, 1899 (R., 144).

Thereafter, in view of the above circumstances, Nash treated the agreement between him and the Loudons as at an end, and directed the Trustees on May 6, 1890 (R., 153), under the second trust to sell the property for default in payment (R., 153). The property was sold and the Trustees deeded the same to Nash May 22, 1890 (R., 72, 172). It seems that Loudon

was present at the sale (R., pp. 111, 120, 127), and also his wife (R., 111).

The next day, or soon after the sale, the Loudons attempted to approach Nash and make some arrangement for getting the property back (R., pp. 111, 112, 114).

From that time there was no demand on the part of the Loudons for the property, or any demand on Nash or his heirs, or any notice to them other than the deed and the agreement to reconvey, nor did the widow and heirs of Nash have any knowledge of any claim on the part of Loudon or his heirs or of any defect in their title. They treated the property as absolutely their own (R., 42, 116, 119, 120).

The building was originally erected in 1872 (R., 95), and cost probably $1,900 or $2,000. It was a frame, built of old materials, and up to 1883 there had been apparently no repairs made upon it. At the time it came into the hands of Nash it was in a very dilapidated condition (R., 37, 39, 52, 97, 98). It was worth at that time about $700 or $800 (R., 106). Nash in his life time made many and extensive improvements. The raising of the grade of the street in front of the building necessitated new approaches (R., 37); and he built an annex to the building in 1893 (R., 39). This annex was built under the personal supervision of Ephriam Nash (R., 70), and contained several stores and increased greatly the rental value.

The improvements made by him amounted to about $700 (R., 66, 69, 100). After his death many improvements were made by his heirs. A new foundation stone wall was built by his son, Frank Nash (R., 43), at a cost of $465 in 1894 (R., 65, 88). There was a law suit concerning this wall which cost the estate $30 (R., 68). Repairs for 1894 were $465, for 1895 $60, for 1896 $120, and for 1897 $372. The original memoranda for these repairs have been lost, but the totals were copied into an exhibit given in evidence made up from the originals (R., 91, 93). There were two fires in Douglass Hall, first in 1896 (R., 43); and the second in March, 1897 (R., 78), which entirely destroyed the building. Insurance from the second

fire to the amount of $935 was collected and paid to George Nash (R., 35).

The destroyed building was a two-story frame. It was rebuilt entirely of brick by Frank Nash (R., 66), at a cost of $3,500 (R., pp. 66, 102).

Frank Nash kept two memoranda books, which contained nearly all of the expenses for rebuilding Douglass Hall. These memoranda totaled $2,919.01 (R., 86, 172). He says this was not the entire expense. He is allowed credit for $2,856.93 (R., 188).

The Court refused to allow expert testimony as to the value of the present building (R., 189).

After the death of Ephriam Nash, the rentals from the property were paid to his widow (R., 29, 44, 69). Rents were collected by William Nash from the old building, and by Frank Nash from the new building (R., 33). None of the rents were received by the daughters (R., 48). Frank Nash was the administrator of his father's estate. Under a family agreement he had no interest in the Douglass Hall property (R., 31).

There seems to be some doubt, even in the mind of the Complainants, as to whether all the heirs of John A. Loudon are before the Court (R., pp. 19-21). None of the heirs of Ellen F. Louden are parties to the cause.

On the 11th day of February, 1904, Louisa G. Nash, one of the Defendants, was decreed insane on the verdict of a jury, and Jane Nash was appointed her committee and duly qualified. The lunacy of the said Louisa G. Nash was suggested to the Court before the final decree, and an answer was filed by the committee, and set forth, among other things, that the lunatic had never been heard nor her rights determined in the matter herein involved (R., 199-200). Notwithstanding these objections, the Court proceeded to a final decree in the cause, and adjudged execution against the lunatic and the other Defendants for costs (R., 201-202). The committee of the lunatic was never made a party to the suit.

The Auditor charged the Appellants with *all the rents received* by them (R., 184), whether on improvements made by

them or already existing, and where estimates only could be made, with the highest estimate (R., 83).

He allowed for no repairs at all until 1899 (R., 187), nor for any for which original memoranda could not be produced. And in some instances statements made from original memoranda which had been lost were rejected (R., 91, 92).

ASSIGNMENT OF ERRORS

1. The Court below erred in decreeing the Complainants (Appelles) entitled to specific performance.

2. The Court below erred in holding that the proper parties were before the Court.

3. The Court below erred in not allowing the Defendants (Appellants) the sum of $3,500 for the restoration of the building destroyed by fire (R., 188).

4. The Court erred in not allowing commissions and compensation to the Defendants (Appellants) for the time and labor expended by them in making improvements on the property, and interest on the money expended by them on the said property (R., 183).

5. The Court erred in not allowing the Defendants (Appellants) the claims of $465 (R., 43, 65, 88), paid for repairs in 1894, and $172.30 (R., 198, 78) paid to repair damage by storm in 1897.

6. The Court erred in charging the widow and heirs of Ephriam Nash, jointly, with the rents received from the said property, and thereby reducing the interest of the heirs who did not receive any of said rents; and in refusing to allow interest on the $1,000 note to be compounded with semi-annual rents.

7. The Court erred in excluding expert testimony as to the value of the buildings destroyed by fire and the cost of its construction (R., 189).

8. The Court erred in not allowing the cost of the stone wall in full (R., 192).

9. The Court erred in excluding the item of $60 for repairs under date of June 10, 1895 (R., 190, 75).

10. The Court erred in excluding the item of $120 for repairs under date of December 10, 1896 (R., 190, 76-78).

11. The Court erred in excluding the item of $172.30 for repairs under date of June 10, 1897 (R., 198, 78).

12. The Court erred in not allowing the items for which no vouchers were filed, but as to which testimony was taken (R., 182).

13. The Court erred in not allowing the item of $700 expended by Ephriam Nash in enlarging and repairing the building (R., 39, 66, 69, 70, 75, 81, 91, 100).

14. The Court erred in charging rent on the value of the property as improved.

ARGUMENT

FIRST ASSIGNMENT OF ERROR

If it be assumed that there was a trust imposed on Ephriam Nash at the time of his purchase and the conveyance to him by virtue of the sale under the second deed of trust, yet the delay and negligence of the parties for nearly eight years after his breach of trust, considering the changed condition of the property and the rights of his heirs should prevent any relief to the Appellees.

"If there be a clear breach of trust by a trustee; yet if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a Court of Equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose."

Hume vs. Beale, 17 Wall., 348.
Quirk vs. Liebert, 12 App., D. C., 394.

The sale to Ephriam Nash and his purchase was voidable only.

In Hammond vs. Hopkins it was held: That a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf directly or indirectly. *But such a purchase is not absolutely void. It is only voidable, and may be confirmed by the parties interested, directly, or by long acquiesence.* The rule as to laches is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. In all cases where actual fraud is not made out, but the imputation rests on conjecture, where the seal of death has closed the lips of those whose character is involved, and the lapse of time has impaired the recollection of the transactions and obscured the details, the welfare of society demands the rigid enforcement of the rule of diligence.

Hammond vs. Hopkins, 143 U. S., 224.

This defense is insisted upon in the answer, and if it were not, the Court may of its own motion raise the question of laches on the part of the plaintiff in seeking equitable relief.

Crutchfield vs. Hewett, 2 App. D. C., 373.

The facts antecedent to the sale and purchase by Ephriam Nash under the second deed of trust show that the Loundons repudiated the contract. They made the breach and made it in a manner which prevented the contract from being performed, therefore, if the case is treated as one for specific performance, according to the bill, this repudiation coupled with the delay and negligence of the Loudons and those claiming against the heirs of Nash in this case, prevents relief to them.

> "Where, however, after the Defendant's *violation or express repudiation* of his contract, the plaintiff delays to proceed for such length of time as to constitute ac-

quiescence in the defendant's breach, or a presumption of abandonment of his right to a specific performance, relief in equity will be denied. And this is particularly true where during such interval *the condition of the parties, or the value of the property has changed,* or *innocent third persons have acquired rights which would be prejudiced by a decree.* * * *

"*Where,* indeed *one* of the parties to a contract *gives express notice to the other that he repudiates it and will not perform,* a comparatively *short period of inactivity* on the part of the other contracting party may be held to *bar specific performance.*"

26 Ency. Law (2d ed.), 80-81.
McDermid vs. McGregor, 21 Minn., 111.
Wolf vs. Great Falls Water Power and Townsite Co., 15 Mont., 49.

Where the vendor of land, in April, 1890, informed her vendee that she would not perform the contract, delay in bringing suit for specific performance until August, 1893, was such laches as barred the action.

Ketcham vs. Owen, 55 N. J., Eq., 344-349-350, citing above case in 21 Minn., 111.

"A party coming to a Court of Equity for specific performance, must show that there is equity, and good conscience, in support of his claim to relief, and that his application is made within a reasonable time, in view of all the circumstances of the case. In this case, the bill was not filed until after the lapse of more than two years from the time the Defendant, Hickey, refused to receive the money and execute the deed. This was undue delay, under the circumstances of the case, and there is nothing shown in the bill to justify the delay. The lots of ground were improved by buildings thereon, and they required the expenditure of the money to keep them in repair and to keep up the insurance, and the salable value of the property was liable to constant change and fluctuation; and where the purchase money has not been paid, the motive for enforcing the contract or not enforcing it may largely depend upon such change in value."

Barbour vs. Hickey, 2 App. D. C., 212.
Presbrey vs. Kline, 20 D. C., 513.
Eastman vs. Plumer, 46 N. H., 464.

"When either party to a contract of sale fails or refuses to claim or act under the contract, for such a length of time as to give the impression that he has waived or abandoned the sale or purchase, and more especially when the circumstances justify the belief that his intention was to perform the contract only in case it suited his interest, he will necessarily forfeit all claim to equity."

"Unless it appear that the party seeking specific performance of an agreement has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere. For if there be reasonable doubt on the transaction the party will be left to his legal remedy for non-performance of the contract."

There are few cases in which courts of equity will insist on the maximum that he who seeks equity must do equity with more rigor than in those of suits for specific performance.

Dyer vs. Hufty, 24 L. R. A., 339. In determining whether it will exercise its discretion in favor of specific performance equity must regard the contract of the parties. * * * Courts of equity will not exercise jurisdiction in specific performance where it would work hardship on people not censurable in conduct and where the circumstances and condition of things have so changed as to make it work loss and hardship to them.

The contract may be considered as one of repurchase, and if so, in such event the rule as to laches above stated applies.

To deny the power of two individuals capable of acting for themselves to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are centainly not prohibited either by the letter or the policy of the law.

Conway vs. Alexander, 7 Cranch, 236-237.

Where sales are made conditionally, or with a reservation of

a right in the vendor to repurchase, he must exercise promptness and precision on his part in the assertion of his right, or it will be lost, especially when the vendee pays a fair valuation for the property. (*Note.* The reason for this is apparent. There is no obligation on the part of the vendor to repurchase. Should the property appreciate in value, he may exercise his right and realize the profit; should it depreciate in value or be injured or destroyed, he may decline to repurchase, and permit the loss to fall exclusively on the vendee. Such being the relative situation of the parties to the contract the law requires promptness on the part of the vendor.)

I Warvelle on Vendors, page 145.

> In a contract for the sale of real estate, it was stipulated that the vendor would, upon request of the vendee, at the expiration of three years from the sale, *repurchase it at the same price,* if the latter should desire to sell it. The vendee failed to make the request until nearly a month after the expiration of the three years. It was held that he thereby lost all right to enforce the contract, either at law or in equity.

Magoffin vs. Holt, 1 Duv. (Ky.), 95.

> "A long delay in offering to repurchase may be excused by and with the consent and approbation of the vendee, but such assent terminates with his death, and the right must be exercised within a reasonable time thereafter."

Beck vs. Blue, 42 Ala., 32.

Because of the repudiation of the contract by the Loudons, Nash was justified in considering the contract at an end.

Thus, where a friendly creditor had bought in his debtor's manufacturing business on execution sale, and then had employed him as manager, and continued the business in his name as "agent" on a trust to turn it over to him when the creditor was fully paid, and on the refusal of such creditor to discharge the bookkeeper said manager left his employment and estab-

lished a rival concern, it was such an inexcusable non-performance of his own part of the agreement as to defeat the enforcement of the trust.

Stafford vs. Carragan, 54 N. Y., Sup. 432.
Thompson vs. Todd, Fed. Case, 13978 (I Pet. c.c., 380).
Conrad vs. Findley, 2 Cal., 174.

Plaintiff entered into possession under an agreement to purchase, but disputed defendant's title and asserting an intention of holding as a squatter. Plaintiff must come in with clean hands.

Kinney vs. Redden, 2 Del. ch., 46.

Vendor withdrew a title deed, to be used in drafting a conveyance, and neglected to return it. Neglected other duties. Not entitled to specific performance.

Clement vs. Evans, 15 Ill., 92.

Deed in escrow fradulently delivered. Parties to fraud could not maintain specific performance.

McClellan vs. Darragh, 50 Ill., 249.

Bad faith of a party in repudiating an obligation to pay interest deprives him of right to specific performance, though there be a part performance sufficient otherwise to entitled him to it.

Gundy vs. Edwards, 30 Ky. (7 J. J. Marsh), 368.

The landlord and tenant proceedings before Harper, J. P., occasioned by the repudiation of the contract by the Loudons, who were solely in possession at the time of the contract of June 18, 1889, followed by the proceedings before Evans, J. P., and in the Supreme Court of the District of Columbia, were affirmative acts of the most positive character, which received judicial sanction in those cases on the sole legal ground that Loudon was holding without right, and was a trespasser. These ac-

> *tions could not have prevailed if the contract was in force, unrescinded, and the legal effect of these decisions is to establish judicially by the judgments rendered that the contract of June, 1889, was not in existence.*

In Woodbury vs. Woodbury, 47 N. H., 22, the Court, by Sargent, J., said: "If the purchaser refuses to complete the contract, the vendor has the right, we think, *to treat him as a trespasser* or as a tenant at will, at his election.

Bancroft vs. Wardwell, 13 Johns, 489.

> "Where a vendee of land is placed in possession in pursuance of a contract of purchase, and fails to perform his portion of the agreement, an action of ejectment will lie against him at the suit of the vendor."

28 Ency. Law (1st ed.), 154.

The Loudons were entitled to avail themselves of every defense in the summary proceedings mentioned, which might have been insisted upon by them in a Court of Equity. In Gelston vs. Sigmund, the appellee had rented from one of the appellants certain property by lease. The appellant averred that he had been in possession under Gelston, with the understanding that he would renew the lease; that the appellant had given him notice to quit, and had instituted summary proceedings to eject him, and that the Court of Common Pleas had decided "that there was merely an agreement to lease, and that such agreement was not binding in law, and the judgment of the Court was therefore against the complainant," and the bill prayed for a specific performance of this agreement to lease. The Court of Appeals of Maryland said:

> "We deem it proper to add further that in the opinion of this Court, the Apellee was entitled to avail himself of whatever equitable right or claim he might possess under a contract for the renewal or the extension of his lease, in defense of the summary proceedings instituted against him by his landlord before the Justice of the Peace, and in the Court of Common Pleas, on appeal, and if deter-

mined against him in that tribunal, he is not entitled to resort to a Court of Equity for relief."

Gelston vs. Sigmund, 27 Md., 334-344.

The constructive notice, if any, occasioned by the record of the agreement of June 18, 1889, was eliminated in the lifetime of Nash by the sale under the second trust, and the recorded conveyance made to him by the trustees; hence, the heirs at law of Nash had only constructive notice that the equities of the agreement had been cancelled by the sale; or in other words, they had no constructive notice of this agreement, particularly in view of the notice they had by construction of the summary proceedings.

The evidence clearly establishes that they had no actual notice of the agreement, but always supposed their father owned the property. With such opinion, they expended a large amount of money on repairs, and finally reconstructed it by the erection of a substantial brick building in lieu of a dilapidated tenement, at a cost of $3,500, thereby becoming bona fide purchasers for a valuable consideration. They have, therefore, both the legal title derived through their father, and the better equity occasioned by their possession and the erection of the improvements.

SECOND ASSIGNMENT OF ERROR

The Complainants are in no event entitled to a decree (a) because Rose Lee died leaving a daughter and husband, who are not shown to have died whether testate or intestate (R., 20-21).

"The plaintiff must remove every possibility of title in another person in the line of descent before he can recover; no presumption being admitted against the person in possession" (Sprigg vs. Moale, 28 Md., 506).

(b) because the lunatic was not properly before the Court.

Committee of lunatic is necessary party.

1 Daniel ch. Pr., 175.

because the committee is trustee of the lunatic's estate.

1 Daniel, ch. Pr., 249.
Ill. &c. Co. vs. Bonner, 75 Ill., 315.
Metheny vs. Bohn, 160 Ill., 263.

In equity the committee should be made a party that he may have notice and protect his ward's interest.

Scott vs. Bassett, 194 Ill., 607: Judgment against infant without guardian *ad litem* is voidable.

O'Hara vs. MacConnell, 93 U. S., 150.

A writ of error or an appeal is the proper remedy where the record of the judgment shows that the judgment debtor was insane at the time it was rendered.

Allison vs. Taylor, 6 Dona, 87.
Re Hooper, 5 Paige, 491.
Lamprey vs. Nudd, 29 N. H., 299.
See N. 6, 34 L. R. A., 781.

The Defendant's have a *legal* title. The fraud, if any, in obtaining the *legal* title was the fraud of their ancestor. They can only be affected if they had notice.

> "The holder of a legal title may always set up want of notice of an equity as a defense to its assertion" (Bispham, Sec. 264).

Again, it is not shown who are the heirs of Ellen F. Loudon, and they are not made parties to this cause.

The agreement to reconvey uses this language (R., 7): "The party of the first part (Ephriam Nash) hereby agrees to reconvey said real estate of said parties of the second part (Ellen F. Loudon and John A. Loudon) their heirs and assigns, so soon as the revenues shall pay," etc.

It appears that John Loudon was married twice (R., 19). His second wife, Ellen F. Loudon, was a widow. He had no children by her (R., 20), but it is not shown whether she had

children by her first marriage or not, or if not, who her heirs were.

If this property had been conveyed to Loudon and his wife during their lives, they would have taken an estate by the entirety, and John F. Loudon, being the survivor, have thus acquired, by the fact of survivorship, the whole estate. But this was not the case. Under the accounting (R., 186), there were not sufficient rents to pay the trust notes, etc., until nearly the close of the year 1896. At this time both parties, and Ephriam Nash, were dead, and there was and could have been under the agreement no reconveyance of the property.

However, the cause has proceeded as if John Loudon had acquired an estate by the entirety, which was not the case, because there was no estate in existence, merely the expectancy of one. The agreement was not to reconvey to the heirs of the survivor, but to "their heirs." Therefore, the cause is fatally defective in not having brought forward the heirs of Helen F. Loudon as parties to the cause.

ASSIGNMENTS OF ERROR 3 TO 13

This Court decided in Corcoran vs. Renehan, 24 App., 411, that the production of vouchers was not absolutely to the proof of items. Yet this principle was ignored in every claim presented in this case.

Even in instances where vouchers were introduced no attention was paid to them by the Auditor (R., 192).

14TH ASSIGNMENT OF ERROR

LIABILITY OF PARTIES IN POSSESSION FOR RENTS. The parties in possession are liable for rents, if they are required to reconvey, as of the condition of the property as it came into their hands, and not for rents of any improvements that they put upon the property. The result is this: The property that came into the hands of the Nash family was an old frame structure in a dilapidated condition, as shown abundantly by the record. It had little rental value. The

Nashes repaired it, painted, put up partitions, new roofs, etc., built an addition to the building. They have been compelled to account for the rents received from this addition, which was built with their own money and which was not on the property when it came into their hands. This is not justice. In 1896 the building was completely destroyed by fire through no fault of the Nashes. They had put insurance on the property where none had before existed. They restored the structure by building a two-story brick in place of the dilapidated frame one, a much more expensive proceeding. They have been required to account for the rents of this more valuable building. In justice they should not be required to account for anything more than the insurance received, $965, with interest on the same; or at least, for nothing more than the rents which the old frame structure would have brought had it stood.

WHETHER RENT CAN BE CHARGED ON VALUE OF PROPERTY AS IMPROVED. The general rule is that in estimating the rents and profits to be charged against the occupant, he should not be required to account for rents and profits on the land *as enhanced in value by improvements placed thereon by him,* but only for those rents and profits which might properly have been charged had the improvements not been made.

XVI Am. & Eng. Ency. Law (2d ed.), 109.

"It is also necessary to observe that in charging rents and profits the estimate must not include any profits which arise exclusively from such improvements; for, if they were to be embraced by the estimate, the occupier would, in fact, be paying for the profits of that which was his own. Therefore, the estimate of rents and profits must be made in exclusion of such as appears to have arisen from occupying claimant's own expenditure in improvements" Moore vs. Cable, 1 John ch., 385.

Neale vs. Hagthrop, 3 Bland (Md.), 590-591.

"Where the title of the complainant in a suit for partition is denied, and the suit is prosecuted to a decree in

his favor, the parties will stand in the same position on the taking of an account for mesne profits, as if the complainant had, after recovering in ejectment, brought an action for mesne profits.

"And if the defendants be bona fide purchasers, and the controversy has been protracted without any fault on their part, the true rental value to be considered as the basis of compensation, is such rental value or occupation rent as might fairly have been made by the defendants during the time of the ouster, by a valid lease of the property in its unimproved condition from year to year, or for a term equal to the period of ouster. * * *

"Where defendants in a partition proceeding are bona fide purchasers, and have put improvements on portions of the land, and have rented such portions by perpetual leases, the ground rents that are due to the enhanced value of the land consequent upon such improvements are not to be charged to such defendants in taking an account of rents and profits."

Worthington vs. Hiss, 70 Md., 172-173.

"The defendants are entitled to set off their improvements against the rents only to the extent that by the expenditure of their labor and money they have enhanced the rental value of the land. *In other words they are not to be charged with the increased rents which are directly traceable to their own reparation and meliorations, but only such rents as the property would have yielded without the improvements.* The additional profits, or income from the improvements, are not taken from the owner's land, but spring from an independent source, to-wit: the labor of the defendants."

McCloy vs. Arnett, 47 Ark., 457.

Where the premises are held BONA FIDE under independent and adverse claims of title, then the party making such improvements is entitled to have their *full* VALUE allowed him. A defendant in ejectment cannot be compelled to pay an enhanced amount as rent in consequent of his own improvements.

Dean vs. Feely, 69 Ga., 804-817.
Adkins vs. Hudson, 19 Ind., 392.

"The defendant has had the use of the complainant's lot, and is bound to pay a fair rent for it; but he is entitled to the use of the buildings free of rent because they were erected at his own expense."

Elliott vs. Armstrong, 4 Black (Ind.), 424.

"There is another consideration which should not be ignored. The rents and profits with which the defendants are charged are for the most part such as have accrued by sole reason of the improvements made by them. It would be most inequitable to charge them, not merely with the rents and profits of that which they had wrongfully and fraudulently taken from the complainant, *but likewise of that which they themselves had created upon the property*. Adkins vs. Hudson, 19 Ind., 392. If it were proper to reject the claim of the defendants for compensation for their improvements, it would be only the dictate of reason and justice that they should not be held liable to the complainant for the profits derived by them from those improvements alone. This would leave them chargeable only with a fair rental value for the land and premises independently of the improvements; and it is not apparent that this would lead to any substantially different result from that of the method of accounting which has been adopted."

McIntire vs. Pryor, 10 App. D. C., 443.

The Defendants (Appellants) were entitled to interest on the outlay for improvements. Hopkins vs. Grimshaw, 17 App. D. C., 11-12.

On redemption of mortgages the mortgagee will be charged with the net rents and profits which he has received without any negligence on his part, after payment of taxes and ordinary repairs and other expenses of that character. But he will not be charged with the increased rents and profits arising from the use of any permanent improvements made by himself.

Bell vs. New York, 10 Paige ch., 49.

The decree of February 24, 1905, was not a final decree from which an appeal would have lain to this Court.

It is plain that no execution could have issued on this decree and that a reference to the Auditor was imperative to ascertain, by taking an account between the parties, whether enough rents had been collected to satisfy the terms of the agreement to reconvey.

In Bostwick vs. Brinkerhoff, 106 U. S., 3, the Court said:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the Acts of Congress giving this Court jurisdiction on appeal and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered."

In Grant vs. Phoenix Ins. Co., 106 U. S., 429, this rule is affirmed, and the Court dismissed an appeal from a decree which, while it overruled the defense, neither found the amount due nor ordered the sale of the mortgaged property.

In St. Louis, etc., R.R. Co. vs. Southern Express Co., 108 U. S., page 24, the Court say:

> "As we have had occasion to say at the present term, in Bostwick vs. Brinkerhoff, 106 U. S., 3, and Grant vs. Phoenix Insurance Company, 106 U. S., 429, a decree is final, for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."

To the same effect are—

Danese vs. Kendall, 119 U. S., 53.
Whiting vs. Bank of United States, 13 Peters, 6.
Forgay vs. Conrad, 6 Howard, 201.
Craighead vs. Wilson, 18 Howard, 199.
Beebe vs. Russel, 19 Howard, 283.
Bronson vs. Railroad Co., 2 Black, 524.
Thomson vs. Dean, 7 Wallace, 342.
Parcels vs. Johnson, 20 Wallace, 653.

Railroad Co. vs. Swasy, 23 Wallace, 405.
Crosby vs. Buchanan, 23 Wallace, 420.
McGourkey vs. Toledo R.R. Co., 146 U. S., 536 (550).

The case of Gilbert vs. Endowment Association, 10 Appeals D. C., 316 (334), in which a motion to dismiss the appeal was overruled differs, as it is respectfully submitted, from the case at bar.

Thereby the decree appealed from a deed was set aside and a reference to the auditor ordered simply to pass upon the claims of certain certificate holders.

In the present case the decree adjudges the Appellee entitled to recover from the Appellant a proportion of the profits or commissions received by him in the course of the transactions set up in the bill in accordance with the interest of the Appellee in such transactions, as shown in the proof. And the reference is ordered to determine what profits were actually received by the appellant, and the proportion thereof payable by him to the Appellee.

In Latta vs. Kilbourn, 150 U. S., 524 (540), the Supreme Court states the distinction which it is submitted exists between the Gilbert case and the case at bar, as follows:

> "If the court made the decree fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it referred the case to him for a judicial purpose, *as to state an account between the parties* upon which a further decree is to be entered, the decree is not final."

See also:

Kane vs. Whittock, 8 Wend., 219.
Patterson vs. Hopkins, 23 Mich., 541.
Clark vs. Roller, 199 U. S., 541.
Guarantee Co. vs. Bank, 173 U. S., 582.

It is submitted, therefore, that the appeal in this case was interlocutory merely.

Respectfully submitted.

EDWARD H. THOMAS,
FRANCIS H. STEPHENS,
Solicitors for Appellants.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1969.

ANDREW O. NASH, FRANKLIN P. NASH, ADM'R OF EPHRAIM NASH, DECEASED, ET AL., APPELLANTS,

vs.

CARRIE L. MILFORD ET AL., APPELLEES.

BRIEF FOR APPELLEES.

A. A. BIRNEY,
H. F. WOODARD,
Counsel for Appellees.

LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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Statement for Appellees.

The complainants (appellees) are heirs of John A. Loudon, who died intestate November 20, 1895. The bill is for the specific performance of a contract made by John A. Loudon with Ephraim Nash, now deceased, who was the husband of the defendant Jane, and father of the other defendants, one of whom is also administrator of his estate.

On June 18, 1889, John A. Loudon and his wife Ellen were the owners of a parcel of land in Anacostia, D. C., which had upon it a building in which were stores and shops and a large hall.

This property was encumbered with two deeds of trust; the first to secure a debt of $1,000; the second to secure forty-four notes of $20 each, maturing monthly and bearing interest.

On the date mentioned (June 18, 1889) three papers

were executed between Loudon and wife and Ephraim Nash as follows:

(*a*) A deed of conveyance from Loudon and wife to Ephraim Nash; an ordinary deed in fee, reciting a consideration of $800 and referring to the encumbrance (Rec., p. 4).

(*b*) An agreement reciting the conveyance to Nash, and, in consideration of $1, binding Nash to reconvey to the Loudons the property in question as soon as the revenues "shall pay the monthly notes secured by second deed of trust on said property, first having paid out of said revenues, income, or rent, taxes, insurance, reasonable repairs, interest on the $1,000 note secured by the first deed of trust on said real estate, and all other proper and lawful expenses in and about the management of said property, said notes secured by second deed of trust, to be paid in the order in which they come due." (Exhibit "B" to bill, Rec., p. 7).

(*c*) A rent agreement upon which Nash let the premises in question to Loudon at a fixed monthly rental.

After the execution of these papers Loudon refused to carry out the agreement and to surrender possession. *Nash then enforced it through the courts*, obtained the possession to which *the deed and rent contract entitled him*, and proceeded to the collection of the rents, *as he was entitled under the agreement.* It does not appear that he had or claimed a right to possession, except under the deed and contemporaneous contract.

Of the forty-four notes secured by the second trust, the first two appeared to have been taken up before the transaction of June 18th; Ephraim Nash held the other forty-two, and later he acquired the $1,000 note secured by the first deed of trust, as appears in the testimony.

Ephraim Nash, having thus in December, 1889, gone into possession, caused the property to be sold *under the second trust* in May, 1890, and took from the trustees

a deed of conveyance. He thereafter treated the property as his own, collecting rents, and making repairs, *but did nothing which was not contemplated by the agreement with Loudon.* Ephraim Nash died January 26, 1894. His wife (who was a party to the agreement) and his children, one of whom became administrator of his estate, continued to hold the property as had Ephraim Nash. In 1897 the building was almost destroyed by fire, and a new structure was erected in its place.

John A. Loudon died November 20, 1895, and on January 12, 1898, his heirs filed their bill against the real and personal representatives of Ephraim Nash, praying specific performance and an accounting under the agreement, and offering to pay any balance that might remain unpaid (Rec., pp. 1–4).

The Defense.

The defense, as shown by the answer, is that because Loudon "repudiated" the agreement by his refusal to surrender possession of the rooms rented to him until he was forced by process to do so, Nash had the right to consider the agreement cancelled, and to order a sale under the deed of trust. The defendants also assert ignorance of the agreement with Loudon, good faith in themselves, and charge laches in the complainants. They also claim that the right of the Loudons to redeem expired on the day of the maturity of the last of the second trust notes, July 8, 1893.

The answer also denied that the complainants are heirs of John A. Loudon, but this point was not urged in the court below, and, in the face of the overwhelming testimony to support heirship, will not be pressed here.

The court, upon final hearing, decreed specific performance of the contract and an accounting (Rec., p. 174).

Upon this accounting before the auditor of the court it was found, that after making all just allowances,

Ephraim Nash and his representative had received more than enough from the property to make good all outlays, and to pay off both the debts secured by deeds of trust. After exceptions to the auditor's report had been heard, the administrator was decreed to pay a surplus of $98.13 to the complainants, and the defendants were required forthwith to surrender the premises to the complainants (Rec., pp. 201, 202). From this decree a joint appeal was noted (Rec., p. 202). On March 20, 1908 (Rec., p. 199), it was for the first time suggested in the cause, that pending the proceedings, and on February 11, 1904, Louisa G. Nash, a party to the cause as one of the children and heirs of Ephraim, was adjudged of unsound mind, and that her mother, also a party, was later appointed her committee. Both Louisa G. Nash and her mother were parties from the inception of the case.

Propositions and Argument.

The case, upon its merits, divides itself naturally into two parts: First, was the decree for specific performance and for an accounting right? Second, was the account properly stated?

The Principal Decree.

The three papers executed together on June 18, 1889, are to be read together as if one document, and when so read the agreement between the parties is clear as the sunlight. It was only that Nash should be invested with the legal title, and with possession, as security for the payment of his debt; that he should collect all rentals and apply the same to taxes, the running expenses of the property, interest on the secured debts, and pay the principal of the second trust debt as rapidly as might

be; when that debt should be paid, he should surrender the premises to Loudon.

The debt is paid; why should not Loudon's heirs have the property?

The Sale under the Deed of Trust.

Ephraim Nash could take nothing by this sale. He was holder of all the notes which the deed of trust secured. As such holder he had, for value, bound himself to Loudon to get payment of his debt in another way, i. e., through application of the rents. His wrongful sale, made in violation of his trust, could not defeat or cancel this contract, and was wholly void as against Loudon. The trust continued. It was because of this "manifest breach of the covenant contained in the agreement with the Loudons" that the auditor stated the account as he did (Auditor's report, Rec., p. 178).

The Claim of Laches.

One defense asserted is that a proper construction of the agreement of June 18, 1889, limits the time for redemption to the life of the forty-four second trust notes, and that because the Loudon's did not come forward to pay during the running of the notes, they have lost their rights.

This is a bold departure from the contract, which required nothing from the Loudons. Nash was to collect the rents and make all payments, and he, of course, *was to keep the accounts.* Upon him, then, rested the duty to inform the Loudons when their debt was paid, and they were entitled to a reconveyance. Until such notice Nash would continue trustee, and limitations would not run in his favor, nor could the charge of laches be fairly made against the Loudons.

The Improper Conduct of Loudon in Retaining Possession as a Defense.

It is true that Loudon wrongfully refused to give possession according to his contract, but the courts, at the instance of Nash, enforced the contract, and refused to sanction Loudon's attempted disaffirmance thereof. *Nash, therefore, obtained possession through enforcement of the very contract which his administrator and heirs now claim was void at the time it was so enforced;* that is, they claim that the unsuccessful resistance of Loudon to the enforcement of a contract worked its avoidance.

The statement of the claim carries its own condemnation.

We submit, then, that it must be held as decided by the decree of February 24, 1905 (Rec., p. 174), that the contract is one of which the complainants are entitled to specific performance, that the claim of laches has no foundation; that the evidence of riotous misconduct by Loudon is no defense; and that the claim of ignorance that their father had no equitable title, did not vest the defendants, his heirs, with that equitable title. They took and could take only what he held, i. e., a legal title to be conveyed to Loudon or his representatives when the deed of trust notes should be paid from the rentals.

The Accounting.

The auditor of the Supreme Court of the District of Columbia having with great care determined the accounts of rents and disbursements, and the court having reviewed that account and corrected it, it is presumed that this court will not go into its details unless some erroneous principle was adopted. This was not done. The auditor properly rejected the monstrous account presented by the defendants (Report, Rec., p. 180), which compounded and recompounded interest charges, and

which appellants have wisely omitted from the record. He then examined each item of claim. Many of these were not proven in any way, but were mere estimates (Report, Rec., p. 179. Geo. J. Nash's test, Rec., pp. 191, 192).

Again, there was every disposition in the two defendants, who testified to outlays to inflame the claim for credits. For example: When Franklin P. Nash, the administrator of his father's estate, was upon the witness stand, in 1903, he testified that the stone wall built in 1894 cost $400, and the total of repairs at that time was $465 (Rec., p. 65). In 1906 he testified the cost of the wall was $350, and the total of the repairs $400 (Rec., p. 190), and when the vouchers for stone and labor were at last produced they showed only $205.87, and there was doubt if part of this total was applicable (Rec., p. 179).

This claim for $465 was disallowed by the auditor and was allowed for $200 by the court, in the final decree.

The Administrator Charged with Rents and Credited with Payments.

In stating the account the court charged Franklin P. Nash with the balance payable, the auditor having treated the defendants as jointly accountable because there was, when he made his report, a balance of debts yet unpaid. The action of the court was right. F. P. Nash was administrator of the estate of Ephraim Nash, as such was chargeable with moneys which came into his hands which would have been paid his father had he lived, and which would have reduced his claims against Loudon. Frank P. Nash collected the rents from April, 1897 (Rec., pp. 36, 47). He alone holds all the rents received since the debt due him as administrator was paid, and having received it during the pendency of this suit, he will not be heard to disclaim liability.

But since it does not appear that there are unpaid creditors of Ephraim Nash, and any surplus above his

debts would be distributable to the widow and heirs, their family arrangement for the division of these rents will not be disturbed because of the technical right of the administrator to collect, as such, the note for $1,000, for should he collect it he would at once be bound to distribute it among the widow and heirs.

The Lunacy of Louisa G. Nash.

Almost at the last moment, in the court below, the lunacy of one of the female defendants was suggested, and it may be urged here as a ground for reversal. It is, of course, a purely technical objection, for the woman has and can have no defense to the merits not equally shared with her mother and brothers. She was served with process when the bill was filed and joined in the answer. Again, when she was found of unsound mind in February, 1904, her mother, also a party to this cause from its inception, was appointed her committee (Rec., p. 199). The lunatic has, therefore, been in fact represented by her legal representative at all times. To reverse the decree *as to her* would, therefore, mean only the repetition of orders and decrees since February, 1904, and idle procedure of no possible profit to anyone.

Again, this lunacy can not be taken advantage of by any but the lunatic. Unless the decrees are wrong upon their merits they must stand as to all the other parties. The appeal however is a *joint appeal* in which Louisa G. Nash's right is not severed from the others. But this objection of lunacy *is an individual and not a joint* objection, and such objection can not be availed of under this joint appeal. For these reasons the sole objection of the alleged lunatic is unavailing and should be rejected.

It is submitted that there is no error in the record available to the appellants.

A. A. BIRNEY,
H. F. WOODARD,
Counsel for Appellees.

A judgment against a lunatic, even tho' prosecute
after his adjudication, is not void or even erroneous

Cripper v Culver, 13 Barb.424
Ex parte Leighton, 14 Mass.207
Foster v Jones 23 Ga.168
48 Pa.St. 70.

At common law the lunatic defended by his guardia
or by attorney; in equity by guardian ad litem.

10 Encyc. Pl. & Pr. 1229 - 1230
Cross v Kent, 32 Md.581.

It cannot be alleged as error that no guardian ad
litem was appointed.

King v Robinson, 33 Me.114.

The Court of Equity will so far control proceedin
against a lunatic as to see that no injustice is done
him, but having the lunatic before it, and finding no
merit in her defense, it will not set aside its orders
only because it did not appoint a guardian ad litem.